2007

State of Utah v. Jesse Valdez : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff / Appellee	:	
vs.	:	Case No. 20070368-CA
JESSE VALDEZ,	:	
Defendant / Appellant	:	

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY,
STATE OF UTAH, FROM A CONVICTION OF THEFT, A THIRD DEGREE FELONY,
BEFORE THE HONORABLE LYNN W. DAVIS

MARK SHURTLEFF
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, Utah 84114

Counsel for Appellee

MARGARET P. LINDSAY (6766)
99 East Center Street
P.O. Box 1895
Orem, Utah 84059-1895
Telephone: (801) 318-3194

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutory Provisions

Cases Cited

IN THE UTAH COURT OF APPEALS

STATE OF UTAH. Plaintiff/Appellee, vs. JESSE VALDEZ, Defendant/Appellant.	Case No. 20070368-CA

BRIEF OF APPELLANT

****

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Whether the trial court erred in denying Valdez's motion to arrest judgment due to testimony by the arresting officer that he had invoked his Fifth Amendment privilege against self-incrimination? Trial courts have discretion in determining whether to grant motions for new trial, and this Court will not reverse the trial court absent a clear abuse of that discretion. *State v. Harmon*, 956 P.2d 262, 265-66 (Utah 1998). "However, 'legal determinations made by the [district] court as a basis for its denial of a new trial motion are reviewed for correctness.'" *State v. Mitchell*, 2007 UT App 216, ¶ 6, 163 P.3d 737 (quoting *State v. Loose*, 2000 UT 11, ¶ 8, 994 P.2d 1237).

In this case, however, there was no contemporaneous objection made to the testimony. Accordingly, this issue should also be reviewed for plain error and ineffective assistance of counsel. To prevail on a claim of plain error Valdez must establish that an obvious and harmful error occurred. *State v. Menzies*, 889 P.2d 393, 403 (Utah 1994) (citing *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993)). *See also*, *State v. Reyes*, 861 P.2d 1055, 1057 (Utah App. 1993). Alternatively, to establish a claim of ineffective assistance of counsel Valdez must demonstrate that counsel's performance was deficient—that it fell below an objective standard of reasonable professional judgment; and that it was prejudicial—affected the outcome of the case. *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citations omitted).

CONTROLLING STATUTORY PROVISIONS

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 23, Utah Rules of Criminal Procedure

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a

commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

STATEMENT OF THE CASE

A. Nature of the Case

Jesse Valdez appeals from the judgment, sentence and commitment of the Fourth District Court after he was convicted by a jury of theft, a third degree felony. Specifically, he appeals from the denial of his motion to arrest judgment.

B. Trial Court Proceedings and Disposition

Jesse Valdez was charged by criminal information filed in Fourth District Court on May 26, 2005 with theft, a third degree felony, in violation of Utah Code Annotated § 76-6-404 (R. 1). He waived his right to a preliminary hearing (R. 29).

A jury trial was held before the Honorable Lynn W. Davis on July 27, 2006 (R. 88-87, 109). During its deliberation, the jury submitted the following question: "We would like to know if there was a checkout counter in the 'outlet?'" (R. 77). The trial court responded: "The jury must rely upon the evidence as presented at trial" (R. 78). After deliberating for approximately ninety minutes, the jury returned with a verdict of guilty (R. 79, 87, 109: 63-65).

Valdez filed a motion to arrest judgment on September 20, 2006 (R. 103-94). After oral argument, Judge Davis denied the motion by written memorandum decision

issued on March 14. 2007 (R. 144-33). The formal order was signed on March 29, 2007 (R. 150-49).

On April 5. 2007 Valdez was sentenced to 0-5 years in the Utah State Prison. The prison sentence was suspended and he was placed on probation for 36-months. and he was ordered to pay a $450.00 fine and spend 365 days at the Utah County Jail in the ankle monitoring program (R. 159-57, 165: 17).

Valdez filed a notice of appeal in Fourth District Court on May 2, 2007 (R. 181).

STATEMENT OF RELEVANT FACTS

Joseph Otte[1] is a Provo City police officer who works part time at Deseret Industries (DI) in plain clothes as a loss prevention officer (R. 109: 13). He has been employed as a police officer for four years, and has worked at DI for three years (R. 109: 13). On May 19, 2005 he was working at DI (Id.). While he was walking through the store looking for suspicious activity, he had contact with Jesse Valdez (R. 109: 15, 13). Valdez approached him in the store and asked to borrow his personal cellular phone (R. 109: 14). Otte could not remember if Valdez informed him who he wanted to call (R. 109: 27).

Otte next saw Valdez as he was "going through an end cap which held jewelry" (R. 109: 15). The end cap had four shelves and the jewelry was packaged in small plastic bags (R. 109: 15). The standard price for such jewelry was $1.00 a piece (R. 109: 29-30).

---

[1] The transcript refers to Otte as "Joseph Audy." However, the trial court, defense and prosecution all refer to him as "Joseph Otte" so that is what will be used.

Valdez selected approximately 20 pieces of jewelry (R. 109: 16) Then he walked down an aisle where he further inspected the jewelry (Id.). He kept some in his right hand and put the rest back on a shelf (R. 109: 16). Valdez looked through more jewelry but didn't select any other items (R. 109: 16). He also removed a pair of sunglasses from his rear pants pocket and picked up a bottle of Pepsi from a shelf with his left hand before moving to the book area (R. 109: 17). Otte followed him (Id.). Otte lost sight of him for about five seconds and when he saw him again, his right hand was now open and the jewelry was missing, and he was still holding the Pepsi in his left hand (R. 109: 17). Otte inspected the book aisle but couldn't locate the jewelry, so he believed Valdez had concealed it on his person (R. 109: 17). Otte also felt Valdez was "getting nervous and seemed to be noticing [his] presence" (R. 109: 17).

Otte went to the far end of the store and observed Valdez from a distance (R. 109: 17-18). Valdez went up and down several aisles, picked up a cart, and put some items in the cart (R. 109: 18). He was in the store for approximately 2.5 hours (R. 109: 18). Otte does not remember Valdez going to the front and using a telephone during this time but "it's possible he could have used the phone up there. It's possible he could have borrowed a cell phone from another person in the store as well" (R. 109: 32-33).

Eventually he went to the front of the store, spoke with the door greeter, and then left the cart in the store (R. 109: 18). He went out the front door and passed all points of sale without attempting to pay for any items (R. 109: 18). He then walked westbound across the storefront towards Columbia Lane (R. 109: 18). Otte admitted that Valdez was headed in the direction of the outlet part of the DI, but testified that Valdez never told

him he was going to the outlet (R. 109: 19, 37). At the time of the incident, there was no interior connection between the main store and the outlet (R. 109: 36).

Otte stopped him and identified himself (R. 109: 18). Valdez admitted to taking the items and Otte took him back to the security room at DI (R. 109: 18). In the office, Otte had Valdez empty his pockets; and from his right pants pocket he pulled out the pieces of jewelry, and a cell phone and spell checker with DI price tags were in his left pocket (R. 109: 20).

At this point the following exchange between the prosecutor and Otte took place:

SANT: Did you have a conversation with the defendant at this point?

OTTE: I did have some conversation. I did read him his Miranda rights, which he under—he said he understood and agreed to speak with me. He did say that he was—he did contact a brother that was en route to Deseret Industries to speak with him about some of the items that he had left in the cart.

When I—I asked him about those items. He said that his conversation with the door greeter was that he informed the door greeter that the items in the cart were his and that he was going to come back for them, and so he left the cart next to the cash register which is—well, so that nobody would purchase them.

I asked him if he told the doorman about the items in his pockets, at which time he stated he pled the Fifth and didn't want to answer the question

(R. 109: 21).

Otte then followed standard protocol for retail theft cases, and called another officer to have Valdez transported and booked into the jail (R. 109: 21). The jewelry, cell

phone, and spell checker were photographed for evidentiary purposes and released back to DI (R. 109: 21).

On cross-examination Otte indicated he had informed Valdez he was under arrest for retail theft and had asked him if he was trying to steal the jewelry by putting it in his pocket (R. 109: 30-31). Otte testified that in response Valdez "said that he had called his brother. He didn't give me a real direct yes or no" (R. 109: 31). Otte also had the following exchange with defense counsel:

GALE: Your conversation with [Valdez] was fairly brief, wasn't it?

OTTE: It was.

GALE: And that was because at some point he told you that he could see that you were—suspected him of shoplifting and he told you he didn't want to talk anymore?

OTTE: That is correct

(R. 109: 37-38).

Valdez asked Otte to go outside and look for his brother, Blake (R. 109: 38). Otte located his brother, informed him Jesse was being arrested, and asked him to take care of Jesse's bike so that it wouldn't get stolen or damaged (R. 109: 38-39). Blake informed Otte that he was there to look at some items and that Jesse had called him (R. 109: 39-40).

SUMMARY OF ARGUMENT

Valdez asserts that the trial court committed plain error in allowing the arresting officer to testify concerning his post-*Miranda* silence. The error was obvious and not harmless beyond a reasonable doubt, and the conviction in this case should be reversed and the judgment arrested. Alternatively, he asserts that he was denied his Sixth Amendment right to competent counsel at trial.

ARGUMENT

I. THE TRIAL COURT COMMITTED PLAIN ERROR IN ALLOWING TESTIMONY FROM THE ARRESTING OFFICER CONCERNING VALDEZ'S POST-*MIRANDA* SILENCE. ALTERNATIVELY, VALDEZ WAS DENIED COMPETENT TRIAL COUNSEL.

Rule 23 of the Utah Rules of Criminal Procedure provides upon motion of the defendant filed before imposition of sentence, a trial court shall arrest judgment "if the facts proved or admitted do not constitute a public offense, or if the defendant is mentally ill, or there is other good cause for the arrest of judgment." Valdez filed a timely motion to arrest alleging that the testimony of the arresting officer that he had invoked his Fifth Amendment privilege against self-incrimination constitutes good cause under Rule 23 which requires arrest of judgment in this matter. Ordinarily, this issue is reviewed under an abuse of discretion standard, with any legal determinations reviewed for correctness. *See State v. Harmon*, 956 P.2d 262, 265-66 (Utah 1998), and *State v. Loose*, 2000 UT 11, ¶ 8, 994 P.2d 1237.

There was no contemporaneous objection to the testimony. However, this Court should still review this issue for plain error, and alternatively for ineffective assistance of

counsel To prevail on a claim of plain error Valdez must establish that an obvious and harmful error occurred. *State v Menzies*, 889 P.2d 393, 403 (Utah 1994) (citing *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993)). *See also*, *State v Reyes*, 861 P.2d 1055, 1057 (Utah App 1993). Alternatively, to establish a claim of ineffective assistance of counsel Valdez must demonstrate that counsel's performance was deficient—that it fell below an objective standard of reasonable professional judgment: and that it was prejudicial—affected the outcome of the case. *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citations omitted).

A. The Trial Court Committed Plain Error which Necessitates Arrest of Judgment in this Matter

Valdez asserts that the trial court committed plain error in allowing testimony from the arresting officer concerning Valdez's post-Miranda silence because it violated his constitutional right against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution. To establish plain error. Valdez must show: (1) an error exists; (2) which should have been obvious to the trial court; and (3) the error was harmful or there was a reasonable likelihood of a more favorable result absent the error. *State v. Reyes*, 861 P.2d 1055, 1057 (Utah App. 1997). *See also*, *State v. Morrison*, 937 P.2d 1293, 1296 (Utah App. 1997). In addition, because the error arises out of an alleged constitutional violation, the State has the burden of demonstrating that the testimony was harmless beyond a reasonable doubt. *State v. Morrison*, 937 P.2d at 1296, 1298 (harmless beyond reasonable doubt standard utilized under plain error standard of review). *See also*, *State v. Harmon*, 956 P.2d at 269 n.4; *Greer v. Miller*, 483

U.S. 756, 765-67, 107 S.Ct. 3102, 3108-09, 97 L.Ed.2d 618 (1987); and *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 1717, 123 L.Ed.2d 353 (1993) (*Doyle* violations are subject to harmless beyond reasonable doubt standard).

The United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment precludes the prosecution from using a defendant's post-*Miranda* silence for impeachment purposes. *Doyle v. Ohio*, 426 U.S. 610, 617-20, 96 S.Ct. 2240, 2244-45, 49 L.Ed.2d 91 (1976). Such use of a defendant's silence is a prejudicial attempt to create an improper inference of guilt in the jury's mind. *See United States v. Newman*, 943 F.2d 1155, 1157 (9th Cir. 1991), and *State v. Byrd*, 937 P.2d 532, 534 (Utah App. 1997). "Similarly, the prosecution may not use a defendant's post-*Miranda* silence as substantive evidence of guilt." *Byrd*, 937 P.2d at 534 (citations omitted). "In evaluating whether the disclosure of a defendant's exercise of *Miranda* rights is a *Doyle* violation, a court must look at the particular use to which the disclosure is put, and the context of the disclosure." *State v. Maas*, 1999 UT App 325, ¶ 21, 991 P.2d 1108.

The trial court's ruling, a copy of which is included in the Addenda, suggests that there was no error—obvious or otherwise—in this case because the holding of *Doyle* only applies to situations where a defendant's exercise of his right to remain silent is used for impeachment purposes (R. 137). *See also*, *Greer*, 483 U.S. at 763, 107 S.Ct. at 3107. More specifically the trial court suggested that there is no violation here where "an officer merely testifies about 'the circumstances of the arrest and... the information elicited was but a part of the natural sequence of events.' *State v. Urias*, 609 P.2d 1326, 1328 (Utah 1980)" (R. 137). Valdez asserts that this analysis is erroneous.

The factual scenario in *Urias* is distinctively different than is present here. The questioning in *Urias* was general and dealt only with the circumstances of the arrest: "Q. After you read him the statement of his rights, did you ask if he understood them? A. Yes, Sir. Q. And what was his answer? A. He exercised his rights and wanted to contact an attorney before he made any statement. Q. Did he thereafter discuss this matter with you at that time? A. No. Sir. I called his attorney." 609 P.2d at 1328. The trial court, sua sponte, struck "I called his attorney" and instructed the jury it was to be disregarded. *Id.* There was nothing in the testimony which could "cast any inference of guilt" or "persuade the jury to do so." *Id*

Similarly, the trial court's reliance on *State v Harmon*, 956 P.2d 262 (Utah 1998), and *State v. Maas*, 1999 UT App 325, 991 P.2d 1108 (Utah 1999), is also misplaced. In *Harmon*, "defendant's invocation of rights was disclosed incidentally in testimony as defendant read a portion of an officer's report intended to refresh [his] recollection of events." *Maas*, 1999 UT 325 at ¶ 22 (citing *Harmon*, 956 P.2d at 266). Defense counsel objected but refused the offered curative instruction. *Harmon*, 956 P.2d at 267. In concluding there was no *Doyle* violation, the Utah Supreme Court noted that the disclosure was inadvertent and didn't cast an inference as to defendant's guilt. *Harmon*, 956 P.2d at 269.

In *Maas*, the testimony by the officer at issue was as follows: Q. "What was the nature of your conversation with Ms. Maas?" A. "…. I explained to Ms. Maas all the evidence I had acquired up to that time. At that time I advised Karen of her rights, read her a waiver, asked her if she wanted to talk to me. She responded 'Why, you have

everything anyway? No, I don't want to talk to you.'" 1999 UT App 325 at n.1. This Court concluded that the testimony was inadvertent and "not significant enough on its own to violate *Doyle*." 1999 UT App 325 at ¶ 24. In addition, there was "no attempt to cast the forbidden inference that Maas's silence equaled guilt. *Id.* at ¶ 25. "When an officer simply testifies about the circumstances surrounding an interview, a part of which is defendant's silence, without using defendant's silence to impeach her credibility, there is no violation of the *Doyle* principle." *Id.*

In this case—unlike *Urias*, *Harmon*, and *Maas*, the nature of Otte's testimony itself casts forbidden inferences on Valdez's guilt. The pertinent exchange between the prosecutor and Otte is as follows:

Q.: Did you have a conversation with the defendant at this point?

A.: I did have some conversation. I did read him his Miranda rights, which he under—he said he understood and agreed to speak with me. He did say that he was—he did contact a brother that was en route to Deseret Industries to speak with him about some of the items that he had left in the cart.

When I—I asked him about those items. He said that his conversation with the door greeter was that he informed the door greeter that the items in the cart were his and that he was going to come back for them, and so he left the cart next to the cash register which is—well, so that nobody would purchase them.

I asked him if he told the doorman about the items in his pockets, at which time he stated he pled the Fifth and didn't want to answer the question

(R. 109: 21). The very nature of this dialogue—that Valdez was cooperative and had an explanation for items he'd left in a cart, but that he wouldn't talk about the items in his pocket instead pleading "the Fifth"—uses his silence to impeach his credibility and creates an inference of guilt. Accordingly, Valdez asserts that the constitutional protections afforded him by the Fifth and Fourteenth Amendments and *Doyle* were violated by the testimony, and any suggestion by the trial court to the contrary is in error.

In *State v. Reyes*, 861 P.2d 1055 (Utah App. 1993), this Court based on prior Utah appellate decisions and *Doyle*, concluded that it was obvious error for the trial court to allow the State to elicit testimony concerning a defendant's post-custody silence. 861 P.2d at 1057, n. 2. *See also*, *State v. Morrison*, 937 P.2d at 1296. In *Reyes*, one of the participating officers testified that after the defendant was taken into custody, he was advised of his Miranda rights. He was also asked to waive those rights and speak to officers without the presence of an attorney. The Officer then testified that the defendant "stated he wanted to have his attorney present to talk to us." No objection to the testimony was made by trial counsel, and this Court utilized the plain error standard of review. 861 P.2d at 1056-57.

In *Morrison*, the arresting officer testified that the defendant seemed willing to speak with him after Miranda warnings were administered until a co-defendant twice told him to shut up. 937 P.2d at 1295. The prosecutor also questioned the co-defendant, who testified that at the time she had her lawyer on the telephone and he advised her to remain silent and for the defendant to do the same. So she told the defendant to shut up. 936 P.2d at 1296. Again there were no objections to the questioning by defense counsel and

the case was argued under the plain error standard. 937 P.2d at 1295, 1296. In relation to the first two prongs of that standard this Court, citing to *Doyle* and *Reyes*, held, "It is error of a nature of that should be obvious to a trial court when the prosecutor violates the well-established general rule prohibiting him or her from eliciting testimony of a defendant's post-*Miranda* silence." 937 P.2d at 1296. Valdez asserts that under *Reyes* and *Morrison*, the first two prongs for establishing plain error have therefore been satisfied.

In regards to the third prong—whether the State's reference to Valdez's post-arrest silence prejudiced him, the "State bears the burden of demonstrating that the improperly elicited testimony was harmless beyond a reasonable doubt." *Morrison*, 937 P.2d at 1296 (citation omitted). "In evaluating whether an evidentiary issue was harmless beyond a reasonable doubt, [this Court] focus[es] on 'whether there is a reasonable probability that the evidence complained of might have contributed to the conviction.'" *Id.* (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963)). In analyzing such prejudice, this Court has utilized the following four factors from *Reyes*: "'(1) whether the jury would 'naturally and necessarily construe' the comment as referring to defendant's silence; (2) whether there was overwhelming evidence of defendant's guilt; (3) whether the reference was isolated; and (4) whether the trial court instructed the jury not to draw any adverse presumption from defendant's [silence].'" *State v. Byrd*, 937 P.2d 532, 535 (Utah App. 1997) (quoting *Reyes*, 861 P.2d at 1057). *See also*, *State v. Tillman*, 750 P.2d 546, 554-55 (Utah 1987). Valdez asserts that after balancing these factors this Court should conclude like it did in *Reyes* and *Morrison*, that

the elicited testimony, which directly referenced his constitutionally guaranteed right to remain silent, constituted plain constitutional error that is not harmless beyond a reasonable doubt.

The first factor is "whether the jury would 'naturally and necessarily construe' the comment as referring to defendant's silence." *Reyes*, 861 P.2d at 1057. The trial court and the State concede that "[t]here is little question that with regard to the first factor, the jury in this case 'would naturally and necessarily construe' the comment as referring to the defendant's silence" (R. 117, 136).

The second factor is "whether there was overwhelming evidence of defendant's guilt." *Reyes*, 861 P.2d at 1057. The trial court concluded that the evidence against Valdez was "overwhelming": "[B]y the time the defendant walked past the cash registers, he had already committed theft. No reasonable person puts a cell phone in a leather case, a spell checker and assorted jewelry in a separate pant's pocket prior to purchase and then leaves a store without any payment or attempted payment for any items" (R. 135).

Valdez asserts, however, that the trial court's conclusion is overly simplistic and does not take into account several other important factors which the jury was privy to, or which this Court has relied upon in other cases. For example, in *Reyes*, one factor which this Court found that weighed in favor of reversal was that testimony that the defendant refused to talk with police could be seen as inconsistent with his defense theory that the evidence was planted to frame him. *Id.* Valdez asserts that factor is also present here. His invocation of his Fifth Amendment right to remain silent—his refusal to talk with

Officer Otte about the items in his pocket—is inconsistent with his theory of the case that he was going from the main part of the store to the outlet to continue shopping while waiting for his brother, and that he had not left the store property nor had he moved towards his bicycle.

While it is true that the items were located in his pockets, Valdez's theory of the case was that he had items in his hands and was using his pockets to secure and hold the items in question while he continued to shop while waiting for his brother. Interestingly enough, the jury submitted a question to the trial court, which read: "We would like to know if there was a checkout counter in the 'outlet?'" (R. 77). Valdez asserts that question demonstrates they were strongly considering his theory of the case and that evidence of his guilt was not nearly as overwhelming as the trial court concluded, particularly in light of the fact that at the time of the incident there was no inside access between the main part of the store and the outlet, and that Valdez's brother did arrive and corroborate his story. *See Morrison*, 937 P.2d at 1297-98 (Defendant found in same room as contraband and claimed that items were under control of co-defendant. Exculpatory explanation was plausible and case turned on defendant's credibility, accordingly appellate court was "not convinced" that evidence of guilt was overwhelming).

The third factor is "whether the reference was isolated." *Reyes*, 861 P.2d at 1057. The trial court concluded that "it is difficult to imagine a more isolated reference than one solitary comment by the officer as part of a long narration" (R. 135). Again Valdez asserts that the trial court's conclusion does not give adequate consideration to

circumstances and events surrounding the testimony. For example, inquiries into a defendant's silence "take on greater significance" in light of a trial lasting only one day. *Velarde v. Shulsen*, 757 F.2d 1093, 1096 (10th Cir. 1985), relied on by this Court in *Byrd*, 937 P.2d at 536. In this case, the presentation of evidence took only two hours and Officer Otte was the only witness. Under these circumstances, Valdez asserts that like in *Byrd*, "Both the short length of the trial and the timing of the prosecutor's references tend to weigh against the State on this factor." 937 P.2d at 536-37. Similarly in *Morrison*, this Court concluded that two references during two witnesses testimonies were not isolated in "the course of a trial which lasted only one and one-half days." 937 P.2d at 1297.

Moreover, in *Reyes*, this Court seemingly linked the third and fourth factors together in its balancing: "Although the elicited comment was isolated and was not referred to in closing argument, the trial court did not immediately admonish the jury to disregard it. Instead, the trial court's curative efforts were limited to a jury instruction given at the close of trial." 861 P.2d at 1057. The fourth factor is "whether the trial court instructed the jury not to draw any adverse presumption from defendant's [silence]." *Byrd*, 937 P.2d at 535. In this case, like *Reyes* and *Morrison*, there was no curative instruction given to the jury regarding the improper testimony or defendant's right to remain silent. *Reyes*, 861 P.2d at 1057; *Morrison*, 937 P.2d at 1297. In addition, like *Reyes*, the trial court's curative efforts here were limited to an instruction given to the jury at the close of trial, which went solely to defendant's decision not to testify and did not include his right to remain silent during pre-trial investigation. 861 P.2d at 1057. *See*

Jury Instruction 18 in the Addenda. Accordingly, Valdez asserts that the fourth factor likewise leads this Court to a conclusion that the testimony as to his invocation of his Fifth Amendment privilege against self-incrimination was not harmless beyond a reasonable doubt.

The trial court's ruling suggests that the invited error doctrine might or should have application here because on cross-examination—after Otte's testimony that Valdez had "pled the Fifth"—defense counsel had the following exchange with Officer Otte:

Q.: Your conversation with [Valdez] was fairly brief, wasn't it?

A.: It was.

Q: And that was because at some point he told you that he could see that you were—suspected him of shoplifting and he told you he didn't want to talk anymore?

A.: That is correct

(R. 109: 37-38). However, Valdez asserts that the invited error doctrine is not applicable here. One, because Otte's original testimony alone constituted a *Doyle* violation that was not harmless beyond a reasonable doubt, and Valdez nor his counsel had nothing to do with the elicitation of that testimony. Two, because the trial court still made no attempt to cure either Otte's original statement or defense counsel's exchange with Otte on cross-examination.

The invited error doctrine provides that "on appeal, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993) (citations omitted). Two

principal purposes are served by this doctrine: One, it fortifies "long-established policy that the trial court should have the first opportunity to address the claim of error." *Id.* (citations omitted). Two, "it discourages parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal." *Id. State v. Arguelles*, 2003 UT 1, ¶ 56 n. 13, 63 P.3d 731 (failure of trial counsel to object to adequacy of evaluations at competency hearing not treated as invited error but reviewed under plain error doctrine). There was nothing in Valdez's acts that could have misled the trial court at the time Otte first testified as to his post-*Miranda* choice to remain silent. Second, if the error is invited here it similarly would have been invited in both *Reyes* and *Morrison* where there were no objections to the challenged testimony by defendant.

Accordingly, Valdez requests that this Court conclude that a *Doyle* violation did, in fact, occur during trial, that it constituted obvious error on the part of the trial court, and that it was not harmless beyond a reasonable doubt.

B. Trial Counsel was Ineffective in Failing to Object to the Testimony and in Further Exacerbating the Error

Alternatively, Valdez asserts that his counsel at trial was ineffective in failing to object to the testimony concerning his post-*Miranda* silence. Valdez must demonstrate that counsel's performance was deficient—that it fell below an objective standard of reasonable professional judgment, and that it was prejudicial—affected the outcome of the case. *Litherland*, 2000 UT 76 at ¶ 19 (citations omitted).

Because the error in allowing the testimony should have been obvious to the trial court under *Doyle*, *Reyes* and other Utah and federal cases, it similarly should have been obvious to trial counsel. Yet no objection was made nor was there any request for a curative instruction. Trial counsel acknowledged his "mistake" during oral arguments on the motion to arrest judgment (R. 166 at 2). Valdez asserts that it is clear from his statements that at the time of trial, he simply was unaware or had forgot about the prohibition against using a defendant's post-*Miranda* decision to remain silent for impeachment purposes. Accordingly, Valdez asserts that the first prong for establishing ineffective assistance of counsel has been satisfied.

Valdez similarly asserts that because the error was harmful under a plain error standard in regards to the trial court, trial counsel's failure deficient performance in this regard similarly prejudiced him.

Moreover, if this Court were to conclude that the invited error doctrine is applicable here, Valdez asserts that trial counsel was ineffective in leading the trial court into error. "If counsel's failure in leading the court into error falls below the standard of reasonable professional practice, we may find that counsel was ineffective." *Dunn*, 850 P.2d at 1220 (citations omitted). Trial counsel—like the prosecution and the trial court—should have known that it was a constitutional violation to allow or elicit testimony of a defendant's post-*Miranda* silence for impeachment purposes or to create an inference of guilt. If trial counsel's exchange with Officer Otte leads this Court to conclude that there was no reversible error due to counsel's invited error, or failure by counsel to object to the original testimony or to request any curative instruction, Valdez

asserts that counsel was ineffective and that he was prejudiced by the deficient performance. Counsel himself acknowledged he made a "mistake" in regards to the underlying testimony at issue here, and in failing to object or request a curative instruction. It is clear, therefore, that there was no trial strategy at play here, rather there was simply a deficiency.

Accordingly, Valdez alternatively asserts that trial court was ineffective in regards to his privilege against self-incrimination under the Fifth and Fourteenth Amendments and *Doyle*, and that as established above he was prejudiced as a result.

CONCLUSION AND PRECISE RELIEF SOUGHT

Valdez requests that this Court reverse his conviction and remand this case to the Fourth District Court for further proceedings.

RESPECTFULLY SUBMITTED this 3rd day of April, 2008.

Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 31st day of March, 2008.

Margaret P. Lindsay
Counsel for Appellant

ADDENDA

RICHARD P. GALE (7054)
UTAH COUNTY PUBLIC DEFENDER ASSOCIATION
Attorneys for Defendant
51 South University Ave., Suite 206
Provo, UT 84601
Telephone: 801-852-1070

IN THE FOURTH JUDICIAL DISTRICT COURT
STATE OF UTAH, UTAH COUNTY

STATE OF UTAH, Plaintiff, vs. JESSE VALDEZ, Defendant.	**MOTION TO ARREST JUDGMENT** Case No. 051402096 Judge Lynn W. Davis

Defendant, Jesse Valdez, through counsel, Richard Gale, and pursuant to Rule 23 of the Utah Rules of Criminal Procedure and based upon the accompanying Memorandum and Affidavit, hereby moves the Court for an Order arresting judgment and granting a new trial.

Rule 23 of the Utah Rules of Criminal Procedure states:

> At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or if the defendant is mentally ill, of there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

Defendant hereby asserts that there is good cause for Judgment to be arrested because error was committed at defendant's trial. This error deprived defendant of his right to due process of law, right to trial by an impartial jury, and right to remain silent in

violation of the Fifth and Sixth amendments to the United States Constitution and Article 1 sections 7, 10, and 12 of the Constitution of Utah.

STATEMENT OF RELEVANT FACTS

On July 26, 2006, a jury trial was conducted in which the jury was asked to determine whether Jesse Valdez was guilty of Retail Theft with prior convictions, a third degree felony. The witnesses testified to the following facts at trial:

1. Officer Joseph Otte (Otte) of the Provo Police Department testified that On May 19, 2005, he was working privately as a loss prevention officer for Deseret Industries (DI) in Provo, Utah. While working he observed the defendant, Jesse Valdez (Valdez) acting in what Otte termed as a "suspicious" manner.

2. Otte continued to observe Valdez for approximately two and one-half hours as Valdez shopped in the store. At one point he saw Valdez holding a handful of $1.00 jewelry items. After losing sight of Valdez for a short period of time, Otte noticed that Valdez was no longer holding the items in his hand. Otte could not locate the items Valdez had been holding in the store and suspected that Valdez had hidden the items on his person.

3. The Deseret Industries building was composed of two sections, to the east the main store and to the west the outlet store. Between the two sections of the store was an employee only section which could not be accessed by the public. Each section of the store had to be entered from the exterior of the building.

4. After Otte watched Valdez for some time, he observed Valdez approach the front of the store pushing a cart that held some remote control cars. Valdez had a brief

conversation with the DI greeter left the cart near the front of the store by the cashiers and exited the store without paying for any items

5 Otte testified that upon exiting the building Valdez headed west in the general direction of the outlet store Valdez's bicycle was left at the bicycle rack which was to the east near the entrance to the main store

6. Otte testified that he stopped Valdez approximately 15 feet from the entrance to the outlet store After stopping Valdez. Otte informed Valdez that he was a loss prevention officer and that he was stopping him because he believed Valdez had concealed some jewelry on his person

7 Valdez admitted to having the jewelry in his pocket and followed Otte back to the main store.

8. In the security room, Otte questioned Valdez When Otte asked Valdez why he had left the store without paying for the items, Valdez stated that he had called his brother so they could look at some items that he had in his cart Otte testified that he later went outside and found Valdez's brother had arrived Valdezs brother verified that Valdez had called him so they could look at some items and determine whether or not they should purchase the items Otte testified that Valdez also stated that he had informed the doorman at DI about his intent to come back for the items in the cart. Otte asked Valdez if he informed the doorman that he had items in his pocket, at which time Valdez stated that he pleaded the fifth and did not want to answer the question.

9. Otte then read Valdez his Miranda rights and asked him to fill out a written statement. Valdez stated he did not want to fill out a written statement.

10. At trial, when questioned by the State on direct examination, Otte testified in front of the jury that Valdez plead the fifth when he asked Valdez if he told the greeter about the items in his pocket. Valdez's attorney did not object. No curative instruction or jury instruction was given to remedy the error.

11. On July 26, 2006, the jury found Valdez guilty of Retail Theft with prior convictions, a third degree felony.

12. Following the Jury trial, Jennifer Ranson, a law student working with defendant's attorney, spoke with one of jurors about their reason for convicting Valdez. The juror stated that two of the jurors believed there was reasonable doubt in the case, but were persuaded to convict Valdez because they thought if he had been innocent he would have protested more, rather than quietly going away to jail. (Affidavit of Jennifer Ranson)

ARGUMENT

Rule 24(a) of the Utah Rules of Criminal Procedure states that "the court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party."

The United States Supreme Court has held that, under the Due Process Clause of the Fourteenth Amendment, the prosecution may not use a defendant's post-Miranda silence for impeachment purposes. *See* Doyle v. Ohio, 426 U.S. 610, 619 (1976). The prosecution's use of post-Miranda silence "prejudices the defendant by attempting to create an inference of guilt in the jury's mind." United States v. Newman, 943 F.2d 1155, 1157 (9th Cir. 1991).

ALLOWING OTTE TO TESTIFY THAT VALDEZ INVOKED HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT WAS PLAIN ERROR

In the present case, Officer Otte's testimony that Valdez "pleaded the fifth" created an inference of guilt in the jury's mind. By eliciting the testimony from the State's main witness that Valdez had invoked his Fifth Amendment right to silence the defendant was prejudiced. Allowing this testimony in contravention of a well-established rule was plain error

A similar circumstance occurred In State v. Morrison, 937 P.2d 1293 (Utah App. 1997). In Morrison police officers executed an arrest warrant on Morrison. After service of the arrest warrant, officers searched the room where they had found Morrison and uncovered drugs, drug paraphernalia, and a loaded gun. At trial, the prosecution elicited testimony from two witnesses regarding Morrison's choice to remain silent after being arrested and receiving his Miranda warning. Defense counsel did not object to either line of questioning. Id. at 1295-1296.

One of the issues on appeal was whether the trial court committed plain error by not *sua sponte* intervening when the prosecutor elicited testimony that improperly referred to Morrison's choice to remain silent after being arrested and after the Miranda warnings had been administered. Id. at 1296.

The Utah Court of Appeals held that "[i]t is error of a nature that should be obvious to a trial court when the prosecutor violates the well-established general rule prohibiting him or her from eliciting testimony of a defendant's post-Miranda silence.

(citations omitted). Thus it was plain error for the prosecutor in this case to elicit testimony from both [witnesses] regarding Morrison's decision to remain silent." Id.

THE ERROR WAS NOT HARMLESS BECAUSE VALDEZ WAS PREJUDICED BT THE ERROR

In Morrison after finding that the court committed plain error, the Court of Appeals considered whether the error was harmless. The court stated, "[t]o establish that this error did not prejudice defendant, the State bears the burden of demonstrating that the improperly elicited testimony was harmless beyond a reasonable doubt. (citations omitted). In evaluating whether an evidentiary error was harmless beyond a reasonable doubt, we focus on 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' (citations omitted)." Id.

The Morrison court used the following four factors established in State v. Reyes, 861 P.2d 1055, 1057 (Utah App. 1993), in its analysis of the harm the defendant suffered: "(1) whether the jury would 'naturally and necessarily construe' the comment as referring to defendant's silence; (2) whether there was overwhelming evidence of defendant's guilt; (3) whether the reference was isolated; (4) whether the trial court instructed the jury not to draw any adverse presumption from defendant's decision not to testify." Id. at 1297.

The facts of the present case are similar to the facts in *Morrison*. Valdez invoked his constitutional Fifth Amendment rights at the time he was detained and taken into custody by Otte at Deseret Industries. At trial the prosecution questioned Otte regarding Valdez's invoking of his constitutional right to remain silent.

As in Morrison, to correctly analyze the harm Valdez suffered by the prosecution's action and the trial court's inaction, the four factors established in Reyes must be utilized.

A. The Jury Naturally and Neccesarily Construed the Comment as Referring to Valdez's Silence

The first Reyes factor asks whether the jury would naturally and necessarily construe the comment as referring to defendant's silence. There is no question that in this case the jury would construe the testimony as referring to the defendant's silence. At trial, the security guard testified that "Valdez stated that he pleaded the fifth and did not want to answer the question." This statement clearly refers to Valdez's silence.

Further, as the attached affidavit shows, after the trial one of the jurors admitted that knowing about Valdez's silence affected the jury's decision to find him guilty.

B. There Was Not Overwhelming Evidence of Valdez's Guilt

The second Reyes factor considers the evidence of defendant's guilt. In order to show harm the evidence must be overwhelming. In this case, the evidence was not overwhelming.

The testimony at trial showed the following facts:

1. Valdez spent over two hours shopping;
2. The items in his pocket were small and could easily have fallen through the shopping cart;
3. Valdez called his brother meet him at the store
4. Valdez had not left the store property and was actually stopped close to the entrance to the outlet store.

5. Valdez told Otte that he was waiting for his brother to bring him money

6. Valdez told the DI greeter he would be back to purchase the items in the cart

7. Valdez left his bike near the entrance to the main store

8. Valdez's brother actually arrived and stated that Valdez had called him to come and look at the items to determine whether they should purchase the items Valdez was accused of stealing.

Certainly this evidence is sufficient for the court to conclude that evidence of Valdez's guilt was not overwhelming.

C. The Reference to Valdez Invoking his Right to Remain Silent was Not an Isolated Incident

The third Reyes factor is whether the reference to Valdez's invoking of his right to remain silent was an isolated incident. In *Morrison*, the court held that two references to the defendant's silence in a 1-1/2 day trial prejudiced the defendant. In the present case, the prosecutor referred to Valdez's invocation of his right to remain silence during direct examination of the loss prevention officer. Although there was a single reference, the reference came from the prosecution's only witness. Furthermore, the trial was a one day trial, the presentation of evidence lasted less than two hours. It was during this short presentation that the reference was made. Although there were two references in Morrison, more evidence was presented in that trial, therefore a single reference in this short trial from the state's only witness, was not an isolated incident.

D. The Court Did Not Give the Jury Any Curative Instructions

The fourth factor deals with the trial courts instructions to the jury not to draw any adverse presumption from defendant's decision not to testify. In the present case. Defendant's counsel did not request and curative instructions and the court did not give any curative instructions *sua sponte*. Jury Instruction #18. instructed the jury that they could not hold Valdez's decision not to testify against him. However, the court did not give a curative instruction to the jury regarding their duty to not indulge in any adverse presumption or inference because of post arrest silence.

CONCLUSION

It was error for the Otte to testify that Valdez invoked his fifth amendment right to remain silent. Although defendant's attorney did not object, this was a plain error because it violated the well-established rule prohibiting the state from eliciting testimony of a defendant's invocation of his fifth amendment right to remain silent. After considering the Reyes factors as outlined in State v. Morrison, 937 P.2d 1293 (Utah App. 1997), the state cannot show that this improperly elicited testimony was harmless beyond a reasonable doubt. This constitutes good cause as contemplated by Rule 23 of the Utah Rules of Criminal Procedure. Therefore, judgment should be arrested and Jesse Valdez should be granted a new trial.

RESPECTFULLY SUBMITTED this 18 day of September, 2006

RICHARD P. GALE
Attorney for Defendant

GENERAL AFFIDAVIT

State of Utah
County of Utah

BEFORE ME, the undersigned Notary, Steven E Averett, on this 11th day of September, 2006, personally appeared Jennifer Ranson, known to me to be a credible person and of lawful age, who being by me first duly sworn, on her oath, deposes and says

On the day of Jesse Valdez's trial, I, Jennifer Ranson, was an extern with the Utah County Public Defender office I had accompanied my supervisor, Mr Richard Gale, to the courthouse, in order to observe Mr Valdez's trial Following the verdict and the close of the trial, I was discussing the case with Mr Gale, in the courthouse parking lot As I walked to my car, my path crossed that of one of the jurors who had decided Mr Valdez's case The juror was a young man, dressed in jeans and a black button-up shirt I greeted him and asked him what he thought about the experience He responded that it was a heavy burden to have the responsibility to make decisions that have a serious effect on another person's life

At that point, Mr Gale approached and asked the juror what had convinced him of Mr Valdez's guilt, what had made up his mind To this, the juror replied that he thought we had made a good argument and that "there had been two of us that were holdouts" but they had finally been convinced when they decided that a reasonable person would have protested for their innocence more than our defendant did He said that rather than just pleading the Fifth, an innocent person would not have gone quietly but would have argued and tried to show his innocence Mr Gale then thanked the juror for his time and service and we all went our different ways

Jennifer Ranson
579 N 800 W, Provo UT, 84601

Subscribed and sworn to before me, this 11th day of September , 2006

[signature of Notary]

NOTARY PUBLIC

My commission expires. January 1, 2010.

STEVEN E. AVERETT
NOTARY PUBLIC • STATE of UTAH
1665 NORTH 1650 WEST
MAPLETON, UT 84664
COMM. EXPIRES 01-01-2010

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff vs JESSE VALDEZ, Defendant	**DECISION ON DEFENDANT'S MOTION TO ARREST JUDGMENT** CASE NO 051402096 DATE MARCH 14 2007 JUDGE LYNN W DAVIS

This matter came before the Court on January 25 2007 Each side was represented by counsel and the defendant was present After entertaining argument, the court took the matter under advisement

The Court having carefully considered the arguments of counsel and the various memoranda in the file, hereby rules as follows

I

Procedural History

1 Defendant, Jesse Valdez, was charged in a criminal information of Theft, a third degree felony, relating to an incident date of May 19, 2005

2 A jury trial was conducted on July 27, 2006 The defendant was present and represented by Richard Gale, a Utah County Public Defender The State of Utah was represented by Jason Sant, Deputy Utah County Attorney

3 The jury returned a verdict of guilty

4 The matter was set for sentencing on September 6, 2006 The defendant failed to appear for sentencing and a no bail warrant issued for his arrest He then appeared late and the warrant was recalled

5 Defendant, by and through counsel, filed a "Motion to Arrest Judgment" on September 20, 2006

6 The State of Utah filed "State's Motion to Enlarge Time to Respond to Defendant's Motion to Arrest Judgment" on October 13, 2006, and subsequently filed "State's Response to Defendant's Motion to Arrest Judgment" on November 29, 2006.

7 Oral Arguments were conducted on or about January 25, 2007.

II

Statement of Relevant Facts

On July 26, 2006, a jury trial was conducted in which the jury was asked to determine whether Jesse Valdez was guilty of Retail Theft with prior convictions, a third degree felony. The witnesses testified to the following facts at trial

1. Officer Joseph Otte (Otte) of the Provo Police Department testified that on May 19, 2005, he was working privately as a loss prevention officer for Deseret Industries (DI) in Provo, Utah. While working he observed the defendant, Jesse Valdez (Valdez) acting in what Otte termed as a "suspicious" manner.
2. Otte continued to observe Valdez for approximately two and one-half hours as Valdez shopped in the store. At one point he saw Valdez holding a handful of jewelry items. After losing sight of Valdez for a short period of time, Otte noticed that Valdez was no longer holding the items in his hand. Otte could not locate the items Valdez had been holding in the store and suspected that Valdez had hidden the items on his person.
3. After Otte watched Valdez for some time, he observed Valdez approach the front of the store pushing a cart that held some items. Valdez had a brief conversation with the DI

greeter, left the cart near the front of the store and passed by all cashiers and exited the store without paying for, or attempting to pay for, any items

4 Otte testified that he stopped Valdez outside of the store After stopping Valdez, Otte informed Valdez that he was a loss prevention officer and that he was stopping him because he believed Valdez had concealed some jewelry on his person Officer Otte testified that "(Valdez) admitted to taking the items, and then I took him into the security room at Deseret Industries "

5. Officer Otte testified further "Once in the security office I asked him to empty the contents of his pockets From his right pant pocket he pulled out the pieces of jewelry There were nine pieces of jewelry all together From his left pocket he pulled out a Nokia cell phone that was in a leather case and a spell checker, both of which had Deseret Industries price tags on them "

6. Officer Otte read Mr Valdez his Miranda rights which he (Valdez) said he understood and Valdez agreed to speak with Officer Otte.

7. In the security room, Otte questioned Valdez When Otte asked Valdez why he had left the store without paying for the items, Valdez stated that he had called his brother so they could look at some items that he had in his cart, not on his person Otte testified that he later went outside and found that Valdez's brother had arrived Valdez's brother verified that Valdez had called him so they could look at some items and determine whether or not they should purchase the items. Otte testified that Valdez also stated that he had informed the doorman at DI about his intent to come back for the items in the cart. Otte asked Valdez if he informed the doorman that he had items in the pocket, at which time Valdez stated that he pleaded the fifth and did not want to answer the question.

8. Valdez's attorney did not object. No curative instruction was requested and no specific jury instruction was given to remedy the alleged error.

9. Upon cross examination, defense counsel asked a question referring to this exact exchange.

Q "And that was because at some point he told you that he could see that you were - - suspected him of shoplifting and he told you he didn't want to talk anymore?"

A "That is correct."

(Transcript at 37-38 emphasis added)

10 Except as noted above, no other reference to Miranda or the defendant's silence was made in either testimony or argument during the remainder of the trial

11 On July 26, 2006, the jury found Valdez guilty of Retail Theft with prior convictions, a third degree felony

III

Law and Analysis

Defendant, Jesse Valdez, through counsel, Richard Gale, and pursuant to Rule 23 of the Utah Rules of Criminal Procedure has moved the Court for an Order arresting judgment and granting a new trial

Rule 23 of the Utah Rules of Criminal Procedure states

> At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or if the defendant is mentally ill, or there is other good cause for the arrest of judgment Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

The defendant asserts that there is good cause for Judgment to be arrested because error was committed at defendant's trial Defendant asserts further that this right to due process of law, right to trial by an impartial jury and right to remain silent in violation of the Fifth and Sixth amendments to the United States Constitution and Article 1 sections 7, 10 and 12 of the Constitution of Utah

The United States Supreme Court has held that under the Due Process Clause of the Fourteenth Amendment, the prosecution may not use a defendant's post-Miranda silence for impeachment purposes *See Doyle v Ohio*, 426 U S 610, 619 (1976) The prosecution's use of post-Miranda silence "prejudices the defendant by attempting to create an inference of guilt in the jury's mind " *United States v Newman*, 943 F 2d 1155, 1157 (9th Cir 1991)

This Court, in the legal analysis, will rely almost exclusively upon the briefing of the State of Utah because it reaches the only legally sustainable result

First Defendant has invoked Article I sections 7, 10, and 12 of the Constitution of Utah, yet his brief does not reference the Utah Constitution or make any independent arguments Accordingly the Court rejects independent state constitution grounds because of the absence of any briefing

Rule 24(a) of the Utah Rules of Criminal Procedure provides that in order for a defendant to prevail on a motion for a new trial, he must how an "error or impropriety which had a substantial adverse effect upon the rights of a party " In the instant case the defendant argues that Officer Otte's solitary reference at trial to the defendant's post-Miranda invocation of his Fifth Amendment rights constitutes a violation of due process as outlined by the U S Supreme Court in *Doyle v Ohio*, 426 U S 610, 619 (1976) and that this solitary reference "had a substantial adverse effect" upon his rights The Court notes that no pre-emptive, pre-trial motion (motion in limine) had been filed and the Court was never alerted to the fact that there might be any problematic testimony

In support of his motion, the defendant relies almost exclusively on two items: an affidavit of a law clerk reporting a post trial conversation the defendant's attorney had with a juror, and the Utah Court of Appeals' decision in *State v. Morrison*, 937 P.2d 1293 (Utah App 1997).

First the Court will address the admission of a clerk's affidavit.

> Utah Rule of Evidence 606(b) states
>
> > Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith . . . Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Similarly, in a civil case, the Supreme Court stated that "[i]t is well settled that the only evidence admissible to impeach a jury verdict is that which demonstrates that the verdict was determined by chance or resulted from bribery." *Groen v. Tri-O-Inc*, 667 P.2d 598 (Utah 1983) (citations omitted). In fact, the *Groen* Court stated that because the jurors' affidavits "make no statement that the verdict or any juror's assent to it was obtained by chance or induced by bribery . . . [t]he affidavits were therefor inadmissible and incompetent as a basis on which to grant a motion for a new trial. *Id.* (citation omitted).

And in a case which predated Evidence Rule 606 and was in part the reason for the existence of Rule 606, *State v. Gee*, 498 P.2d 662 (Utah 1972), the defendant asserted that the trial court erred in denying his motion for a new trial on the ground that the jury discussed his

failure to testify and considered that as a factor in arriving at its verdict The defendant called as a witness one of the jurors who testified that "she would not have concurred in the verdict, had the discussion of defendant's failure to take the stand not been a significant part of the deliberations " *Gee* at 663 In response, the Utah Supreme Court stated

> In a long line of decisions in this jurisdiction, the principle has been firmly established that evidence by affidavit or testimony of a juror will not be received to impeach or question the jury verdict or to show the grounds upon which it was rendered, or to show their misunderstanding of fact or law, or that the misunderstood the charge of the court, or the effect of their verdict, or their opinions, surmises and processes of reasoning in arriving at a verdict. (Citations omitted)

And in *State v Lucero*, 886 P.2d 1 (Utah App 1993), the defendant submitted an affidavit of a juror to support his claim that one of the jury instructions improperly influenced the jury and the jury's deliberation In response, the Court of Appeals stated "All inquiries into the thought processes of the jurors are improper because they undermine the integrity of the verdict . . . Because the affidavit contains information concerning the jury's deliberations, the trial court properly refused to consider it." *Id* at 3 (*citing State v Thomas*, 830 P 2d 243, 248 n. 4 (Utah 1992)).

Based upon this analysis, together with deficiencies discussed later, the Court rejects the law clerk's affidavit.

Next, the Court will address whether the trial court's admission of Officer Otte's testimony constituted a due process violation.

As stated above, the defendant, in his Motion, relies almost exclusively on the *Morrison* decision. The *Morrison* decision, in turn, cites and relies upon *Doyle* in holding that "[i]t is error of a nature that should be obvious to a trial court when the prosecutor violates the well-established general rule prohibiting him or her from eliciting testimony of a defendant's post-

Miranda silence " *Morrison*, 937 P 2d at 1296 However, the defendant's reliance on *Morrison* is misplaced in the instant case because the Utah Supreme Court has held that no *Doyle* violation has occurred when an officer merely testifies about 'the circumstances of the arrest and the information elicited was but a part of the natural sequence of events " *State v Urias*, 609 P 2d 1326, 1328 (Utah 1980)

The U S Supreme Court held in *Doyle v Ohio* that the use for impeachment purposes of a defendant's exercise of his right to remain silent violates the Due Process Clause of the Fourteenth Amendment to the U S Constitution The Court later explained in *Greer v Miller*, 483 U S 756 (1987), that the prosecution must make some "specific inquiry or argument" regarding the defendant's post-Miranda silence for a *Doyle* violation to occur *Greer*, 483 U S at 764 The Utah courts have repeatedly construed *Doyle* and *Greer* to mean that a due process violation "involves more than simply referring to a defendant's post-Miranda silence " *State v Maas*, 991 P 2d 1108, 1112 (Utah App 1999), *State v Harmon*, 956 P 2d 262 (Utah 1998) The Utah Supreme Court has held that "the mere mention that a defendant invoked his constitutional rights does not prima facie establish a due process violation " *State v Harmon*, 956 P 2d 262, 268 (Utah 1998) In *Harmon*, the Supreme Court refused to find a *Doyle* violation because the reference to the defendant's invocation of rights was elicited "merely incidentally" and the prosecutor made no further reference to the defendant's silence or attempt to "persuade the jury to do so " *Id* at 269 In *Maas*, even though the arresting officer mentioned at trial that the defendant had invoked her *Miranda* rights, the Utah Court of Appeals held that "[t]he disclosure of Maas' invocation of rights was incidental to the description of Officer Neal's conversation with Maas" and found no *Doyle* violation *Maas*, 991 P 2d at 112 The *Maas* court follows *Greer* when it states "A prosecutor must specifically inquire about or argue using a defendant's exercise of his rights in a context that would impeach a defendant's exculpatory explanation of his conduct " *Id*

Harmon and *Maas* are controlling in the instant case Officer Otte's statement revealing that the defendant had "pled the Fifth" came at the end of a long narration of events as he

answering questions (after his waiver), did nothing to protest his innocence It is not implicit that the juror was referring to the defendant's post-Miranda invocation silence In other words the juror could just as easily have been referring to the defendant's choice of pre-invocation statements To argue that the verdict would have turned out differently because of one juror's unclear statement of one reason why he or she voted to convict is highly questionable The juror could have been referring to the fact that when the defendant was confronted outside the store about having jewelry items on his person, he did not protest, but frankly admitted taking the items The ambiguity of the affidavit is troubling and forms an independent basis for its rejection

The State of Utah easily satisfies the second *Reyes* factor, "whether there was overwhelming evidence of the defendant's guilt" *Id* The case facts and the prosecutor's arguments centered on the fact that by the time the defendant walked past the cash registers, he had already committed theft No reasonable person puts a cell phone in a leather case, a spell checker in a pant's pocket and assorted jewelry in a separate pant's pocket prior to purchase and then leaves a store without any payment or attempted payment for any items Certainly, a jury may conclude on these facts that the defendant was guilty– without any argument or reference whatsoever by the State that they should draw an inference of guilt from his silence The evidence of guilt was overwhelming

The State also satisfies the third Reyes factor, "[w]hether the reference was isolated" It is difficult to imagine a more isolated reference than one solitary comment by the officer as part of a long narration, without any subsequent argument or inquiry by the prosecution *Morrison*, in contrast, had two entire lines of questioning concerning the defendant's silence, with clear indication from the prosecution as to what conclusion the jury should draw from his silence *Morrison* at 1295-96 In stark contrast, the reference in this case is clearly and unquestionably isolated

The Fourth Reyes factor, "whether the trial court instructed the jury not to draw any adverse presumption from the defendant's decision not to testify," *Morrison* at 1297, may have been satisfied by jury instruction 18 The defendant correctly states that the instruction does not

answered the prosecutor's open-ended question "Did you have a conversation with the defendant at this point?" Officer Otte says nothing about the defendant's invocation of rights until the fourteenth line of his testimony, as printed in the trial transcript Neither the prosecutor nor Officer Otte makes mention or makes even a vague reference to the invocation of rights at any other time during the trial, either in examination or in argument There was no 'specific inquiry or argument" regarding the Defendant's silence The reference was only "incidental" and was part of Officer Otte's recitation of the "natural sequence of events"

Clearly this case is distinguishable from *Morrison*, since in that case the prosecution focused an entire line of questioning on the defendant's "willingness to talk," using two different officer witnesses, and asserting in argument a theory about the defendant's intention in keeping silent, *Morrison*, 937 P 2d at 1295-96 Nothing akin to the *Morrison* scenario has occurred in this case

Even if the trial court's admission of Officer Otte's statement was error, it did not have a "substantial adverse effect upon the rights of a party" sufficient to order a new trial

Even if Defendant were correct in arguing that the trial court erred in admitting Officer Otte's testimony, the error was harmless The purpose of the *Reyes* factors are to "guide" the court, and the State need not prevail on all four factors to show harmlessness *Morrison* at 1296

There is little question that with regard to the first factor, the jury in this case "would 'naturally and necessarily construe' the comment as referring to the defendant's silence" *Id* It is certainly unclear whether "knowing about Valdez's silence affected the jury verdict" Assuming, arguendo, that this Court were to admit the law clerk's affidavit, a thorough reading of the affidavit shows that the juror was concerned about the defendant's failure to protest his innocence What is claimed is that the juror was concerned about the defendant's failure to protest his innocence What is not known is if the juror's concern arose from the defendant's pre-waiver statements or his post-invocation silence This is not known because the defendant had, prior to invoking Miranda, previously waived Miranda and willingly answered questions It is reasonable to infer that the juror was concerned that the defendant, while he was willingly

specifically refer to 'post arrest silence' but that is not an element that the *Morrison* or *Reyes* courts have required or even analyzed The Court concludes that it is unclear whether instruction 18 sufficiently instructs the jury that it should not make any presumption or inference from the defendant's silence

The Court has addressed and considered all the *Reyes* factors Nevertheless it is the opinion of this Court that the facts of this case are exceptionally unique

The Court notes that the State's reference to the defendant's silence was isolated and was elicited by a generic question The only specific inquiry relating to defendant's silence was elicited by the defense not the prosecution (See transcript at 37 38) It is clear that the defense cannot invite error and then rely upon that error on appeal or for another remedy It is unclear whether the defense can enhance and independently re-emphasize the "silence error" by its own cross examination however isolated and then continue to claim 'plain error" Once the defense engages in cross examination specifically referencing the silence of the defendant is the *Morrison/Reyes* analysis even applicable? Neither the defense nor prosecution addresses this critical issue It has not been briefed and the Court is left to ponder Is the curative instruction obligation waived? Query Was it the prosecution, defense or neither that may have created an inference of guilt in the jury's mind by referencing the defendant's silence? How can this Court differentiate?

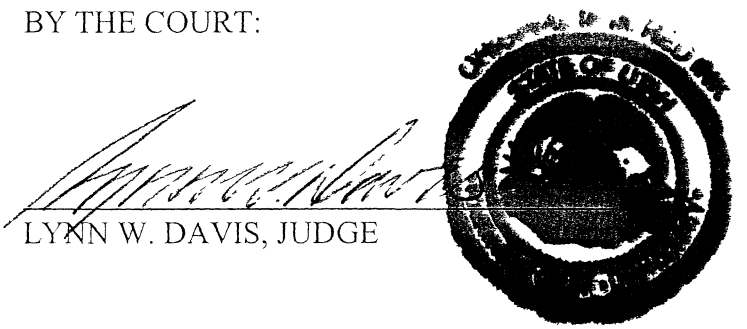
IV

Conclusion

For the reasons cited above, the Court denies the defendant's Motion to Arrest Judgment. The State of Utah is instructed to prepare an Order consistent with this ruling. The clerk of the court is instructed to set this matter for sentencing forthwith.

Dated this 14TH day of March, 2007

BY THE COURT:



LYNN W. DAVIS, JUDGE

INSTRUCTION NO 18

A Defendant is not required to testify in Defendant's own behalf. The law expressly gives a Defendant the privilege of not testifying if that Defendant so desires. The fact that a Defendant has not taken the witness stand must not be taken as any indication of that Defendant's guilty, nor should you indulge in any presumption or inference adverse to the Defendant by reason thereof. The burden remains with the State, regardless of whether a Defendant testifies in Defendant's own behalf or not, to prove by the evidence such Defendant's guilt beyond a reasonable doubt.